

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of

A Proposal for Revision the MDS and ITFS Regulatory)	
Regime," Submitted by the Wireless Communications)	Docket No. RM-10586
Association International, the National ITFS Association,)	DA 02-2732
and the Catholic Television Network)	

To: The Commission

COMMENTS OF THE ITFS SPECTRUM DEVELOPMENT ALLIANCE, INC.

Submitted by:

ITFS Spectrum Development Alliance
P.O. Box 6060
Boulder, CO 80306

Date: November 14,2002

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Appendix A

Appendix B

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To: The Commission

Comments of The ITFS Spectrum Development Alliance, Inc.

This filing is submitted by the ITFS Spectrum Development Alliance, Inc. (“Alliance”) in response to the Commission’s request for comment on “A Proposal for Revising the MDS and ITFS Regulatory Regime” (hereinafter referred to as the “White Paper”), submitted by the Wireless Communications Association International, the National ITFS Association, and the Catholic Television Network (hereinafter collectively referred to as the “Petitioners”).

About the Alliance

The Alliance was formed in 1999. It is composed of seven organizations that are licensed to operate ITFS systems in almost 100 communities nationwide, ranging in size from New York City to Hays, Kansas.’ It is a non-profit organization intended to provide

¹ The members of the Alliance are: Chicago Instructional Technology Foundation, Denver Area Educational Telecommunications Consortium, Hispanic Information & Telecommunications Network, Instructional Telecommunications Foundation, North American Catholic Educational Programming Foundation, Portland Regional Educational Telecommunications Corporation, and Twin Cities Schools’ Telecommunications Group.

member licensees with the full complement of technical and business representation needed to convert their systems successfully to digital two-way operation.

Alliance members deliver a wide variety of ITFS services. For instance, Hispanic Information & Telecommunications Network transmits instructional programming in Spanish, and also provides high-speed internet access to numerous schools in Puerto Rico by satellite. North American Catholic Educational Programming Foundation produces original instructional programming in many academic subject areas, as well as religious programs. Through its ITFS service, Instructional Telecommunications Foundation helps elementary and secondary schools to build libraries of instructional videos in wide array of school subjects.

Last year, the Alliance and its members entered into a pioneering excess capacity agreement with Clearwire Holdings, Inc. (“Clearwire”), which agreement provides funding for Alliance members’ educational activities, as well as the opportunity to launch educational data services via ITFS.² The Alliance believes that there are important educational opportunities in data delivery by ITFS, and is committed to a future that involves providing two-way data service for education.

Summary of Comments

The Alliance supports the evolution of ITFS/MMDS into a service that can deliver effective fixed and mobile data services. We recognize that the current ITFS/MMDS technical rules will not be adequate to allow such an evolution to take place. We believe that the White Paper embodies important proposals to facilitate the desired evolution, including a revised bandplan, and the substitution of geographic

² We wish to clarify that these comments reflect the position of only the Alliance and its member organizations. They were not prepared in consultation with Clearwire, and are not intended to reflect Clearwire’s views.

service areas for protected service areas. We applaud the extensive technical study which produced these ground-breaking recommendations.

Although we support the White Paper's general approach to implementing the Commission's ITFSMMDS "flexible use" decision, we believe that the White Paper contains significant flaws that must, and can, be rectified. As educational organizations, Alliance members are particularly concerned about biases and omissions in the transition process proposed in the White Paper---in particular, with respect to the role of the Proponent. Further, the White Paper does not properly deal with a number of rules and practices that could lead to the termination of ITFS service in many communities. For example, the White Paper does not propose to eliminate Section 74.932(d) of the Commission's Rules, which classifies ITFS channels that have been off the air for a year as permanently discontinued, and requires their licenses to be forfeited. As well, the White Paper does not adequately address the lot of ITFS licensees which lose the use of their main transmitter sites, and are forced to move.

Finally, the Alliance believes that if the Commission concludes that it must auction ITFS spectrum, in order to preserve the educational character of the service it must prevent commercial entities from financing non-profit licensees' bids, and declare that for-profit ITFS licensees are ineligible to bid against non-profit licensees for ITFS spectrum.

Points of Agreement

The Alliance agrees with much of what is set forth in the White Paper. In particular, we agree with most of what the Petitioners write about the background of ITFSMMDS technical rules, and the impediments those rules represent to the needed

evolution of these services.³ We recognize that a thoroughgoing reformulation of the ITFS/MMDS technical regime is needed in order to make ITFS and MMDS effective twenty-first century services.

In general, the Alliance supports the bandplan revision proposed by the White Paper, especially the de-interleaving of ITFS/MMDS channels, and the separation of high power from low power operation. We further support the creation of exclusive geographic service areas to replace the often overlapping and dysfunctional 35-mile protected service areas.

We appreciate that the White Paper's proposals provide for the continuation of instructional video service on ITFS facilities.

We support the White Paper's technical approach to dealing with "brute force overload" interference to receivers of high-power ITFS transmissions (though, as described below, we believe that the Proponent's obligation to provide such protection should be extended).

Points of Agnosticism

The Alliance recognizes that crucial elements of the White Paper are embodied in the proposed signal limits at the GSA border,⁴ and the proposed spectral mask.⁵ Setting proper parameters for such limits is essential if two-way mobile operation is to be possible. However, the Alliance lacks the in-house engineering expertise to properly evaluate the White Paper's proposals in these regards. We look forward to reviewing the record of technical comments, and may offer our own engineering analysis at the NPRM stage of this proceeding.

³ White Paper, pp. 1-10, and, in particular, the critique of current rules set forth on pp. 7-10.

⁴ *Id.*, pp. 26-28.

⁵ *Id.*, pp. 28-30.

Points of Disagreement

Despite the commendable aspects of the White Paper, and the very significant effort that went into its preparation, it contains critical defects that must be corrected.

Bandplan Transitions and the Role of the Proponent. A number of important problems revolve around the transition process, and the role of the Proponent as set forth in Appendix B of the White Paper.

The Alliance's views on the transition process are informed by its members' dealings with commercial wireless communications operators, which generally have performed a Proponent-like role in technical coordination in the metropolitan areas they serve.⁶ Often, Alliance members have had constructive relationships with operators in the communities they serve, but there have been instances of bullying and bad faith on the part of operators as well. Attached hereto as Appendix A is Instructional Telecommunications Foundation's recent Opposition to Petition to Deny submitted in response to litigation commenced before the Commission by WorldCom Broadband Solutions ("WorldCom") in connection with a modification proposed for ITF's Philadelphia system, WHR-527. In this instance, WorldCom attempted to use its control over antenna facilities as a means to secure leverage in excess capacity lease negotiations. WorldCom forced WHR-527 off the air for a period of nearly a year by refusing to continue to share a tower and antenna system.

Later, after ITF had entered into an excess capacity agreement with a competitor, WorldCom filed a petition to deny against ITF's application to build equivalent facilities

⁶ For instance, operators have often secured a common tower site for ITFS and MMDS licensees in a given metropolitan area, typically arranging to multiplex the output of licensees' transmitters through either one or two shared transmitting antenna systems. They often have provided in-kind engineering support, both in designing and maintaining transmission facilities.

at a tower a few hundred meters away. WorldCom alleged that ITF's proposal would cause adjacent channel interference to its Philadelphia MMDS stations. In our view, WorldCom's petition games the system in order to create obstacles and expense for ITF and its commercial partner, Clearwire.

The Alliance does not believe that we---or the Commission---should presume bad faith by every Proponent in a bandplan transition. The fact is, however, that WorldCom and other wireless cable operators have used the Commission's rules as weapons. They can be expected to continue to misuse the regulatory process unless the opportunity for abuse---and the rewards that come with it---are eliminated. Just as the White Paper includes measures designed to prevent greenmail and other abuses by licensees, the Alliance believes that rules governing the transition must also guard against bad faith and bad acts by Proponents.⁷

The White Paper's Appendix B regime revolves around the "reasonableness" of a Proponent's transition plan. Though it proposes nine "safe harbors" to shelter Proponents from accusations of unreasonableness,' the White Paper does not attempt to enunciate a standard of reasonableness upon which both licensees and Proponents can rely. This is a failing that will impose added burdens on the Commission to resolve disputes that might never had arisen if clear standards had been enunciated, and also will increase the danger of abuse on the part of Proponents.

⁷ While it is not the Alliance's purpose to devote these Comments to an exhaustive description of problems with existing wireless communications operators, we want the Commission to be aware that the Philadelphia dispute with WorldCom is not an isolated instance. If appropriate, in this proceeding, or at the NPRM stage, we are prepared to describe other cases of operator conduct that give rise to concern over possible over-reaching or abuses by Proponents.

⁸ White Paper Appendix B, pp. 21-27.

The risk of abuse by Proponents is further increased by the fact that the White Paper's process for adjudicating the reasonableness of transition plans is not even-handed. If a Proponent loses such an adjudication, its risk is capped at the licensee's litigation cost.⁹ However, should a licensee lose in such a proceeding, its potential liability is much higher---the incremental difference in the cost of the Proponent's plan and the licensee's.''

Further, if a licensee produces a counterproposal, the Commission would look only to the Proponent's plan and decide whether it is "reasonable.'" Quite simply, if the Proponent manages to adduce a "reason" for the elements of its plan---a task which takes little creativity---the Proponent's plan arguably prevails. We believe that adjudications should compare the reasonableness of both the Proponent's proposal and a licensee's counterproposal.

Though there are a number of Proponent-centered "safe harbors," the White Paper sets forth no criteria to assist parties in crafting reasonable proposals, or to guide the Commission in making a "reasonableness" determination. Further, given the complexity of the task, a licensee should be allowed more than the White Paper's recommended 20 days in which to review the plan, evaluate it, negotiate with the Proponent, and develop a counterproposal, if needed.¹² Three weeks are simply not enough time, and such a short period will increase the Commission's involvement in resolving transition plan disputes, as haste will limit negotiations between the parties regarding a transition plan.

⁹ *Id.*, p. 21.

¹⁰ Keep in mind that the typical ITFS licensee is a non-profit or governmental organization that will not have financial reserves to pay for an adverse judgment, and thus will be deterred from contesting an unreasonable plan, no matter how unlikely the prospect of losing.

¹¹ White Paper Appendix B, p. 21 (third bullet point).

¹² *Id.*, p. 20.

Also, while the Alliance does not object to the idea that later commercial entrants should reimburse the Proponent for a pro-rata share of transition expenses, the White Paper does not set forth the mechanisms for such a process in nearly enough detail. Specificity is important in this context, as a Proponent which has launched two-way service will have every incentive to obstruct and overcharge a newcomer.

There is a four-fold prescription for these problems.

First, an even-handed adjudication process is needed---one that contains penalties sufficient to deter bad conduct by all parties. As proposed, licensees alone run the risk of unlimited liability. If licensees must undergo such risks, the system should be designed to deter Proponents from pressing their advantage recklessly; indeed, Proponents should lose their right to propose and execute the transition if it is found that they have litigated an unreasonable plan, or if they initiate a transition process and then terminate it prior to completion.¹³

Second, the Commission should enunciate clear “reasonableness” standards, upon which Proponents and licensees alike can rely, and which recognize that it is the public interest that is the ultimate guide to outcomes. Attached to these Comments as Appendix B is a list of standards which the Alliance recommends in this connection. We believe that these standards provide all concerned parties with a clear set of expectations, and will reduce the incidence of disagreements requiring Commission intervention.

Third, the roster of “safe harbors” should include those which are protective of licensees’ rights as well as Proponents’ prerogatives. Like clear standards of reasonableness, these additional safe harbors will reduce the number of controversies

¹³ In the alternative, the Commission might find it appropriate to lower penalties for losers so that it feasible for licensees to contest bandplans.

referred to the Commission for resolution. Attached to these Comments as Appendix C are a number of additional recommended safe harbors.

Though relegated to an appendix to these comments, such added safe harbors are actually quite central. For instance, while the White Paper implies that an A group licensee is entitled to receive a “standard” allotment of channels A-1, A-2, A-3, and A-4 as a result of a transition, there is no safe harbor or other standard that says so. What is an under-funded educational institution to do if it is confronted with a putatively reasonable transition plan that proposes to assign it channels A-2, C-4 (through a swap of A-1 with another ITFS licensee), A-4, and E-4 (through a swap with one of the Proponents MBS MMDS channels)? The “standard” plan gives the licensee three contiguous LBS channels, which can be put into two-way service independently. In contrast, the “putatively reasonable” proposal tendered by the Proponent could include no contiguous low-power spectrum, and would make the licensee highly dependent upon the Proponent if the licensee wants to utilize two-way facilities for instructional service.

Fourth, the Commission should set forth clear standards governing the reimbursement of a Proponent’s transition expenses by newcomers. The Alliance believes that newcomers should have to reimburse only a share of documented out-of-pocket costs reasonably incurred and actually paid to non-affiliates to build and install the ITFS/MMDS equipment required for the transition.¹⁴ The expense pro-ratio percentage should be a fraction, the numerator of which is the number of channels to be used by the newcomer in the market, and the denominator of which is the number of channels transitioned by the original Proponent. A five-year sunset on reimbursements should be

¹⁴ No reimbursement should be available when the transition involves, or could be accomplished, by simply changing the nameplate on transmitters.

imposed, in recognition of the limited useful life of ITFS/MMDS equipment. In the event of a dispute concerning the amount to be reimbursed, a newcomer should be allowed to launch service in the market immediately---prior to the end of any adjudication---and the losing party should be required pay the winner's litigation expenses.

The Alliance recognizes that in order for bandplan transitions to go forward, Proponents will be needed. A clear regime will reduce risks for all parties, and minimize the Commission's regulatory burden. An even-handed regime will not hinder entities which intend only to revise the bandplan so as to accommodate new service---as distinct from gaining leverage over licensees for financial advantage or other motive.

Incompatibility With Current ITFS Rules. Although the White Paper recommends the abolition of a number of outmoded ITFS/MMDS rules,¹⁵ it does not propose to alter current Section 74.932(d). This is incomprehensible, in light of the fact that the White Paper is clear that low-power channels are likely to remain dark for extended periods, as they often will not be needed at the initial stages of a two-way mobile system.“ If the White Paper regime of shutting down ITFS channels as part of a transition is implemented, 74.932(d) clearly needs to be eliminated.

Incompatibility With Current Private Agreements. The White Paper alludes to the efficacy of frequency-offset in reducing analog video co-channel interference.¹⁷ However, it does not deal with the fact that during the period of analog video dominance on ITFS/MMDS, licensees often entered into contractual agreements requiring continued

¹⁵ White Paper, pp. 51-58.

¹⁶ *Id.*, footnote 117, pp. 43-44. The Alliance supports the White Paper's premise that it is counter-productive to construct (or to keep in operation) obsolete ITFS facilities, both during and preceding bandplan conversion.

Id., Appendix B, p. 8.

offset operation. While these agreements will remain appropriate for high-power mid-band channels that continue analog transmission, such agreements will block entire bandplan transitions if they are applied to low-power LBS or UBS channels. Indeed, it makes no sense to impose these agreements designed for high-site, high-power operations on low-site, low-power UBS and LBS operations. Similarly, they will impede a transition if the plan calls for digital transmission on MBS channels in a community, while licensees in a neighboring market remain analog and seek to enforce legacy offset agreements. For this reason, the Commission should clarify that such legacy agreements are enforceable only to the extent that they govern analog operations in the MBS. In other words, any party to such an agreement should be free to disregard it, without liability, in proposing and operating LBS and UBS facilities, as well as digital MBS facilities.

Threats to Continued ITFS Service. As exemplified with the experience of ITF's Philadelphia system, ITFS (and MMDS) licensees sometimes lose access to transmission sites through lease expirations or the end of relationships with a sublessor. In such circumstances, there is a public interest need to preserve ITFS service. The White Paper has a variety of conflicting provisions that would bear on such a circumstance. First, it implies that short tower moves can be carried out by the licensee without Commission oversight.¹⁸ However, on the other hand, the White Paper proposes to retain the 0 dB adjacent channel interference standard for high power operation.' As the Philadelphia situation illustrates, a captious first-adjacent channel licensee can identify spots where this standard is not met, even with a very short tower move. The White Paper is silent

¹⁸ The White Paper states that site moves of 1.6 km or more would not be classified as major changes, and thus would not require that an application be filed. P. 34.

¹⁹ P. 31.

about whether a licensee can implement an “application free” minor change, even when that change means disregarding an interference standard. Finally, the White Paper recommends strict limits on a licensee’s ability to change its high-power operations prior to a bandplan transition.²⁰ What happens in a Philadelphia-like situation during the period prior to the local bandplan conversion?

The Alliance submits that the Commission needs to develop a uniform approach to the preservation of ITFS service, since ITFS is relied upon by millions of students and teachers all across the country. We recommend that if a licensee loses access to its tower site for any reason (including site contract termination), it should be permitted to relocate its transmission facilities without regard to whether the relocated facilities exceed the 0 dB interference standard in certain locations. In identifying a new facility, the licensee should obey the precepts of Section 74.902(h) of the Rules, and re-locate as close to other ITFS/MMDS stations as possible.

Brute Force Overload Protection. Section IV.B.2.a of the White Paper specifies that all ITFS receive sites will be eligible for upgraded downconverters if they were in service as of the New Bandplan Rules Effective Date. The Alliance submits that this is not the appropriate eligibility date. It may take many years for a given area to undergo transition, and our experience is that there is a steady churn of instructional sites that are added and deleted from an ITFS system. We believe that the appropriate date for eligibility would be the date that a licensee responds to a Proponent’s information request preceding an actual transition.

Uniform Standards As to Licensees’ Obligations to Supply Transition Information. The White Paper specifies that ITFS licensees will lose their legal rights to

²⁰ White Paper Appendix B, p. 2.

downconverter upgrades if they fail to supply information to the Proponent within a defined time frame.²¹ However, other important information sharing requirements that apply equally to ITFS and MMDS do not lead to the loss of a licensee's legal rights if such licensee does not provide technical information by a date certain.²² The Alliance agrees that it is important that licensees supply technical information promptly, but believes that both the requirements and sanctions applicable to ITFS and MMDS licensees should be uniform. We do not think that it is an appropriate penalty for licensees to lose their legal rights due to the failure to respond to requests for information, given that other sanctions are applicable.

ITFS Auction Provisions. Due to the educational nature of ITFS, the Commission properly has found it inappropriate to auction ITFS spectrum. Indeed, the FCC twice has recommended that Congress exempt ITFS from the auction provisions of the Communications Act.²³ Nonetheless, the Petitioners urge the Commission to proceed with auctions both to resolve pending mutually-exclusive ITFS applications and to allocate "white space" outside the boundaries of all ITFS geographic service areas.²⁴ If the Commission determines that the public interest now requires the auctioning of ITFS spectrum, the Alliance believes that special safeguards are needed to insure that the educational purposes and identity of ITFS are preserved.

²¹ White Paper, p. 36. ("In the absence of a response, the requesting licensee should be permitted to proceed with its proposal without having to provide protection to eligible [ITFS] receive sites.")

²² *Id.*, pp. 24-25. ("While WCA, NIA, and CTN anticipate that the vast majority of licensees will cooperate in informal information exchanges, there is concern that an uncooperative licensee in the vicinity of a given market could have a substantial adverse impact on the ability of MDS/ITFS to provide that market with broadband services." As mentioned above, however, this passage does not go on to recommend the termination of legal rights should the MDS or ITFS licensee fail to supply the needed information by a deadline.)

²³ See *Broadcasting Auction Report and Order*, 13 FCC Rcd at 15999-16002, and *Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, 15 FCC Rcd 15376, 15445.

²⁴ White Paper, pp. 41-42.


The Commission needs to recognize that because of excess capacity considerations, ITFS spectrum auctions are likely to become contests not between licensees, but between commercial lessees. The most discordant result will occur when one bidder is backed by a for-profit lessee, while its competitor attempts to secure spectrum from its own financial resources. Under these circumstances, the commercially-backed surrogate is much more likely to secure the spectrum than the entity which plans only educational uses for its channels. Another skewed outcome is likely when multiple ITFS licensees are backed by different commercial parties, and the auction winner is determined by which for-profit entity has the deepest pockets.

To prevent these undesirable outcomes, the Commission should require that ITFS bidders pay for spectrum from their own funds, without using money obtained from third parties.

Further, it is possible that some auctions for “white space” could involve both commercial ITFS licensees and educational licensees that operate on the same channel groups. In such cases, the commercial entity is almost sure to prevail. In order to preserve ITFS spectrum for education, the Alliance recommends that the Commission declare that for-profit ITFS licensees are ineligible to compete against non-profit licensees in ITFS spectrum auctions.

Respectfully submitted,

THE ITFS SPECTRUM DEVELOPMENT
ALLIANCE, INC.

By: 
John B. Schwartz, President

The ITFS Spectrum Development Alliance, Inc.
P.O. Box 6060
Boulder, CO 80306
(303) 442-2707

Dated: November 13, 2002

Appendix A to Comments of The ITFS Spectrum Development Alliance, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of)
INSTRUCTIONAL TELECOMMUNICATIONS)
FOUNDATION, INC.) BLNPIF-20020618AAC
For Modification of License of ITFS)
Station WHR-527, Operating on the G)
Channel Group at Philadelphia, PA)

To: Chief, Wireless Telecommunications Bureau

CONSOLIDATED OPPOSITION TO PETITIONS TO DENY

By the above-captioned application, Instructional Telecommunications Foundation, Inc. ("ITF") seeks to re-locate the transmitting antenna of ITFS station WHR-527 from one tower to another within Philadelphia's Roxborough antenna farm. The distance between the current and proposed towers is approximately 290 meters. In addition, by the above-captioned application, ITF seeks to reduce the height of WHR-527's antenna centerline by 139 feet.

WorldCom Broadband Solutions, Inc. ("WBS") petitioned to

deny the above-captioned application.¹ In addition, Northwest Communications, Inc. ("Northwest") filed a "Petition to Partially Deny" the above-captioned application with respect to the proposed modification of channel G-1.² WBS and Northwest are collectively referred to herein as the Petitioners.

Both Petitioners allege that first-adjacent channel interference would result from the proposed re-location ~~of~~ WHR-527's transmitting antenna.³ By this pleading, ITF hereby opposes the WBS and Northwest petitions to deny.

Background

These petitions can best be understood by reviewing the history of WHR-527's technical operation, as well as the business relationship between ITF and both **WBS** and **WBS's** predecessors as operators of the wireless cable system in Philadelphia.

For many years, **WHR-527** has operated at its currently-authorized tower site, **216** Paoli Avenue, Philadelphia. **WHR-527** transmitted from an antenna which is over **1,050** feet above ground **level**, and **operated** as part of the Philadelphia wireless cable system. Control of this system changed three times; during the

¹ According to WBS's petition, WBS is licensee of MMDS stations WNEY590 (channel H-1) and WNET336 (channel H-2) and applicant for channel H-3 by pending application File No. 19960510FO. The MMDS H channels are first adjacent to the ITFS G channel group.

² According to Northwest's petition, Northwest is licensee of MMDS station WHT664, operating on the F group channels. MMDS hannel F-4 is first adjacent to ITFS channel G-1.

³ Neither petition appears to raise objection to the proposed reduction in transmitting antenna height.

bulk of this period, the system was operated by CAI Wireless Systems ("CAI"), now a subsidiary of WBS.

An excess capacity agreement between ITF and CAI provided WHR-527 with the use of transmitters, as well as shared use of a combining network, transmission line, a transmitting antenna, tower space, and equipment space for tape playback operations. This agreement was extended numerous times, but ultimately expired at the end of February, 1999. At that time, ITF ceased leasing excess capacity to CAI, but continued to operate on an instructional-only basis with the same shared facilities for a one-year "hold-over" period. The hold-over period was provided for by the then-expired agreement between ITF and CAI; during that year, there was no charge to ITF for use of these facilities.

During the period prior to the expiration of the CAI excess capacity lease, CAI and ITF had negotiated extensively for its renewal on a long-term basis. These negotiations were complicated by the fact that CAI had severe financial problems, went bankrupt, and then emerged from bankruptcy with a somewhat uncertain future.

As early as 1997, ITF's management realized that WHR-527 might have to secure tower space and other facilities independently of CAI. ITF believed that in order to properly control adjacent-channel interference, it had to keep the WHR-527 transmission facilities within the same antenna farm as the 216 Paoli Ave. tower, located in the Roxborough neighborhood of

Philadelphia.⁴ At that time, and in subsequent periods, it proved impossible to obtain replacement tower space in the Roxborough antenna farm, due chiefly to the fact that local television stations had to add new transmitting antennas for digital operation, while at the same time maintaining their existing antennas for analog. Certain existing tower owners planned to build new towers, but such either were not available for rent to outside parties or were delayed repeatedly, chiefly due to local zoning proceedings and opposition from neighbors.

The one-year hold-over period concluded on February 28, 2000, and at that time ITF still was unable to secure replacement tower space. Instead, it negotiated an agreement with WBS, which by then had purchased CAI, to continue sharing the previously-free facilities for four additional months at a rent of \$3,750 per month.

By this time, CAI had been acquired by WBS, which itself was a subsidiary of WorldCom, Inc. ("WorldCom") While WorldCom itself later went bankrupt, in 2000 it appeared to be financially sound. Under these more favorable circumstances, the ITF and WBS attempted to negotiate a replacement for the expired CAI lease. This exchange also failed to produce an agreement, however.

At the conclusion of those four months, ITF requested to

⁴ As described in greater detail later in this Opposition, the Commission has recognized the value of having adjacent channel ITFS/MMDS facilities located nearby in order to limit adjacent channel interference. See *Amendment of Part 74 of the Commission's Rules and Regulations With Regard to the Instructional Television Fixed Service*, 101 FCC 2d 50 (1985), paragraphs 128, 130.

continue operating at 216 Paoli Avenue at the same monthly rent and on the same other terms, but WBS refused to continue the arrangement.⁵ Clearly, continuing this facilities rental would have entailed no operational detriment to WBS, as WHR-527 had shared this tower for many years. Further, continuation would have benefitted WBS financially, as WBS incurred little or no expense in the rental, while ITF was paying WBS at the rate of \$45,000 per annum in rent.

WBS's motivation in refusing to extend the short-term facilities agreement **was** to gain leverage over ITF in excess capacity agreement negotiations. In fact, control over a transmitting tower is often used as a tactic by an operator in order to secure an advantage over an **ITFS** licensee, especially when that licensee will have difficulty staying on the air.⁶

Such was the case in the relationship between WBS and ITF in

⁵ ITF and WorldCom disagree as to whether WorldCom was obliged to continue the arrangement as a result of WorldCom's obligations as a Philadelphia MMDS licensee pursuant to Section 21.902(b)(1) of the Commission's rules. This rule section states in pertinent part: "As a condition for use of frequency in this service, each [MMDS] applicant, conditional licensee, and licensee is required to: (1) Not enter into any lease or contract *or otherwise take any action* that would unreasonably prohibit location of another station's transmitting antenna at any given site inside its own protected service area." [Emphasis added,] ITF maintains that WorldCom has such an obligation and WorldCom has disputed this view.

⁶ This leverage is considerable. In addition to disrupting an ITFS licensee's instructional operations, knocking a station off the air could result in the loss of its FCC authorization. Section 74.932(d) of the Commission's rules states, in pertinent part: In case of permanent discontinuance of operation of a station licensed under this subpart, authority to operate is forfeited and the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section, a station which is not operated for a period of one year is considered to have been permanently discontinued.

Philadelphia. During the free hold-over period, and the ensuing four months, ITF continued its efforts to locate replacement tower space. Those efforts were unsuccessful. Consequently, WHR-527 was forced to sign off the air on June 29, 2000 and discontinue its instructional service to schools in the Philadelphia metropolitan area.

After WHR-527 was forced to discontinue operation, ITF pursued a number of avenues to obtain tower space and return the station to the air. Relatively little had changed between the time ITF had attempted to locate space in 1997; existing towers were fully loaded, and the long-anticipated new towers had not yet been built. After extensive efforts on a number of fronts, ITF obtained an offer of temporary space at the 216 Paoli Ave. from the tower's new owner, American Tower, and of eventual permanent space on a new Roxborough tower American planned to build.

In order to minimize windload at the heavily-taxed 216 Paoli Avenue tower, American Tower required WHR-527 to transmit at a much lower antenna height (with a new radiation center of only 602 feet above ground, as opposed to the prior 1,050') and restricted WHR-527 to relatively low-diameter 1 5/8" coaxial cable, which produces high transmission line losses. The effect of lower transmitting height was to restrict WHR-527's line-of-sight coverage considerably. At the expected new tower, however, American offered a height of approximately 1,000 feet above ground and the use of much larger EW-20 elliptical waveguide,

which produces lower line losses. These new facilities at the anticipated new tower, would allow similar coverage to that which WHR-527 enjoyed in the past.

On March 21, 2001, ITF applied to the Commission for special temporary authority ("STA") to operate WHR-527 at the 216 Paoli Avenue tower, using the 602' transmitting antenna height.⁷ The Commission granted this application by a decision letter of May 1, 2001, and ITF certified that the STA facilities had been constructed as of June 26, 2001.

While the STA facilities enabled **ITF** to resume instructional operations, the lower height meant that numerous schools which had received ITF's programming from the prior antenna height of 1,050' above ground level could no longer pick up the signal from the lower transmitting elevation. (The period of nearly a year off the air also contributed to the disruption of the relationship between ITF and the schools it had long served in the Philadelphia metropolitan area.)

Because of lag time in American Tower's completing of its new Roxborough tower, ITF has sought and received three extensions to the STA for WHR-527's temporary operations at the 602' level at 216 Paoli Avenue. WHR-527 continues to operate pursuant to this STA.

The above-captioned application represents ITF's proposal to resume long-term operation at a higher elevation within the

⁷ The STA application was assigned the file number BSTAIF-2000321ABK

Roxborough antenna farm so as to provide better service to area schools. The Roxborough location was selected as a means of controlling adjacent channel interference, as mentioned above, and as ITF had indicated in its original application for an STA.⁸

Discussion of the WBS and Northwest Petitions

WBS is in the untenable position of both causing and protesting the above-captioned application. ITF has offered (and hereby reiterates the offer) to share the equipment and tower location it long occupied at 216 Paoli Avenue. If provided the same equipment and tower access, we repeat our prior offer to pay WBS rent at the rate of \$45,000 per year.

While WBS has long denied it, its actions in this case clearly trigger the provisions of Section 21.902(b) (1) of the Commission's Rules, which as a condition of their authorization, requires MMDS licensees to: "Not enter into any lease or contract *or otherwise take any action* that would unreasonably prohibit location of another station's transmitting antenna at any given site inside its own protected service area." [Emphasis added.]

With respect to the Northwest petition to deny, ITF's president contacted a principal of Northwest not long after receiving service of Northwest's filing. The Northwest principal stated that Northwest had filed its petition because a WBS representative, pursuant to a lease agreement between those two

⁸ See the exhibit entitled "Justification for STA," BSTAIF-2000321ABK, p. 1.

parties, had demanded that such a filing be made.⁹

As is evident from the preceding narrative, ITF has made extraordinary efforts to collocate its facilities with those the Petitioners and to avoid theoretical adjacent channel interference. While the Petitioners, nonetheless, complain of theoretical adjacent channel interference based upon the 0 dB rule, they conveniently ignore those efforts and Rule 74.902(h), which provides an exception to the 0 dB rule for ITFS stations. Rule 74.902(h) states:

Where adjacent channel operation is proposed in any area, the preferred location of the **proposed** station's transmitting antenna is at the site of the adjacent channel transmitting antenna. If this is not practicable, the adjacent channel transmitting antennas should be located as close as reasonably possible.

Rule 74.902(h) was adopted in the same proceeding in which the Commission first applied the **MDS** 0 dB adjacent channel rule to **ITFS** stations. In describing Rule 75.902(h) (then codified at 74.902(g)), the Commission observed why it believed that the MDS 0 dB rule should not be an absolute requirement for ITFS stations:

Most commentators believe that only in rare situations would two separate educational entities find a common site mutually acceptable. MDS operations, in contrast, would normally desire to operate from a single central location to serve a metropolitan area as efficiently as possible. Therefore, although we are encouraging the use of collocation for ITFS, we realize that its

⁹ The Engineering Statement filed by Northwest is prepared by the same WBS employee who prepared the Engineering Statement filed as part of the WBS petition to deny. The language of the two engineering statements are essentially identical.

benefits may be much more limited in ITFS than in MDS due to the fundamental differences between the two services.¹⁰

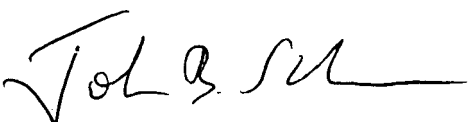
In this case, the location of ITF's transmitting antenna "is not practicable" due to the actions of one of the Petitioners and ITF has taken action so that its transmitting antenna is "located as close as reasonably possible" to WBS's transmitting antenna. For those reasons, ITF's application should be granted under the provisions of Rule 74.902(h).

For the foregoing reasons, ITF hereby request that the Commission deny the petitions to deny filed by WBS and Northwest.

Respectfully submitted,

INSTRUCTIONAL TELECOMMUNICATIONS
FOUNDATION, INC.

By:



John B. Schwartz, President
P.O. Box 6060
Boulder, CO 80306

Dated: October 29, 2002

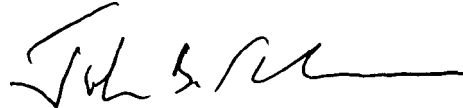
¹⁰ Amendment of Part 74 of the Commission's Rules and Regulations With Regard to the Instructional Television **Fixed** Service, 101 F.C.C.2d 50, para. 128 (1985) (MM Docket No. 83-523).

Declaration of John B. Schwartz

My name is John B. Schwartz, and I serve as president of Instructional Telecommunications Foundation, Inc.

I declare under penalty of perjury that the facts set forth in the accompanying Opposition to Petition to Deny are true and correct to the best of my knowledge and belief.

Executed on October 29, 2002

A handwritten signature in black ink, appearing to read "John B. Schwartz", written over a horizontal line.

John B. Schwartz

Appendix B to Comments of the ITFS Spectrum Development Alliance, Inc.

Elements of a Reasonableness Standard for ITFS/MMDS Bandplan Transitions

1. The bandplan conversion must be carried out without material financial, technical, or operational detriment to the affected ITFS/MMDS licensee(s).¹
2. Subject to the requirement that later commercial operators reimburse a pro-rata share of transition costs, Proponents must pay the full cost of bandplan transitions.
3. There should be no requirement that a licensee enter into any contractual agreement with a Proponent (including, without limitation, an excess capacity lease) in order to have the licensee's channel(s) transitioned.²
4. In the event of a dispute over one or more aspects of a bandplan transition tendered to a licensee by a Proponent, the licensee may counterpropose a plan and offer to pay for the disputed aspect(s); subject to rebuttal by the Proponent, a licensee's counterproposal that does not rely upon the resources of the Proponent shall be presumed reasonable in any adjudication.
5. Bandplan transitions must be completed expeditiously, and according to a pre-established schedule.
6. All parties involved in a bandplan transition must promptly provide such information, access to facilities, and other cooperation as is necessary to carry out a bandplan transition.³

¹ Involuntary surrender of an LBS or UBS channel is a clear technical detriment.

² The sole reason for the Proponent concept is that the ITFS/MMDS licensee, with its limited financing, may not be able to fund the relocation of its educational video programming from presently licensed channels to the MBS channel(s) allotted to it. There is no justification for giving the Proponent any control of UBS or LBS channels not licensed to the Proponent. Worse, such control can be used to discipline ITFS and MDS licensees to lease to the Proponent, or take action detrimental to the ability of the licensee to use the channels in competition to the channels of the Proponent. While the Petitioners may argue that the Proponent is crucial to making this transition of ITFS educational programming, that is true only in those instances in which the number of educational programming streams exceeds the number of MBS channels allocated to a given licensee. In many cases, all the Proponent needs to do to effect a transition is to change the nameplates on existing transmitters.

³ Naturally, an entity that does not control access to a given facility is not responsible for providing access.

Recommended Additional “Safe Harbors”

1. An ITFS licensee must be able to continue to transmit the same number of video program tracks at the conclusion of the transition at it does presently, without material financial, technical, or operational detriment to such licensee.
2. An ITFS/MMDS licensee should receive the standard post-transition channel assignments for its channel group, per the normal bandplan set forth in the White Paper. (For instance, following the transition, a C group licensee should receive channels C-1, C-2, C-3, and C-4, as well as corresponding I and J channels.) If the Proponent’s plan entails utilizing digital compression for one or more a licensee’s MBS channel(s), the licensee should nonetheless be allocated, and given exclusive use of the capacity created on, its normal MBS channel allotment.
3. Any ITFSMMDS channel swaps that take place as part of a bandplan transition should be voluntary, not mandated upon a licensee. Without limitation, no ITFS licensee should be required to exchange any UBS or LBS channel for an MBS channel without its consent and the consent of the other licensee involved.
4. A Proponent must demonstrate that it is financially and technically capable before it is allowed to begin implementing ITFSMMDS facilities transitions. All necessary transition funds must be placed in trust prior to the commencement of a transition process.’
5. Each transition plan should contain an item-by-item timeline for the expeditious completion of all transition changes. A Proponent’s failure to adhere to the timeline should trigger the right of a new Proponent to take over the transition process and complete it at the original Proponent’s expense.
6. The existence of capacity leases should not be a barrier to a transition. To this end, a capacity lessee of channels should not be entitled to void the lease or seek damages as a result of the transition of the leased channel capacity by a third-party Proponent---or by the lessee itself as Proponent.² The need for this safe harbor is especially evident in cross-market transitions, where ITFS/MMDS

¹ Contrary to the recommendations of the White Paper, a financial escrow is not a suitable basis for assuring financial performance, because if a Proponent goes bankrupt, escrow funds will become part of the Proponent’s bankruptcy estate and the escrow agreement will be subject to termination. Rather, it is necessary that transition funds be placed in trust.

² Indeed, it makes little sense to look to lease relationships as a qualification for Proponent status, yet allow the Proponent to create a transition that allows it to void or seek damages under a lease.

operations in nearby cities need to be shut down to allow development in a neighboring market.

7. No MBS licensee should be required to agree to a carrier offset arrangement unless it is also clear that the other co-channel licensee is agreeing to reciprocal obligations that make the offset work, and it is also clear that either licensee is free to depart the arrangement by converting to digital transmission.